BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Six-Day to Five-Day Street Delivery and Related Service Changes	))	Docket No. N2010-1

VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
RESPONSE TO MOTION TO STRIKE
CONTAINED IN REPLY BRIEF OF AMERICAN POSTAL WORKERS UNION
(November 1, 2010)

BACKGROUND

On October 25, 2010, the American Postal Workers Union, AFL-CIO ("APWU") filed its Reply Brief in this docket which incorporates a renewal of APWU's Motion to Strike Portions of USPS Brief (Oct. 19, 2010), and expands that motion to include a request to strike portions of Valpak's Initial Brief:

> Further, **the Commission should strike** from the record of this docket Sections III.B through III.F, on pages 7-27 of the **Postal Service Initial Brief** and Section IV on pages 17-21 of **Valpak's Brief**.... [T]he **arguments** raised in APWU's Motion to Strike Portions of USPS Initial Brief **apply equally to Valpak**. [APWU Reply Brief, pp. 1, 2 n.2 (emphasis added).]

Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (hereinafter "Valpak"), pursuant to 39 C.F.R. 3001.21(c),[1] hereby submit their response to APWU's motion to strike portions of its Initial Brief.

[1] Section 3001.21(c) of the Commission's rules states that "Motions to strike are requests for **extraordinary relief** and are not substitutes for briefs or rebuttal evidence in a proceeding.... Responses to motions to strike are due within seven days." (Emphasis added.)

ARGUMENT

APWU mischaracterizes Valpak's arguments as stating "that the Commission is **required to disregard** the field hearing testimony…." APWU Reply Brief, p. 6 (emphasis added). To the contrary, Valpak's Initial Brief explained that these statements may "be considered and addressed by the Commission in the same manner as opinions and arguments submitted in comments and briefs." Valpak Initial Brief, pp. 18-19. However, the Commission cannot rely on such field hearing statements as constituting record evidence under 39 U.S.C. section 3661 and 5 U.S.C. section 556. Valpak Reply Brief, pp. 7-8.

APWU's arguments for striking the indicated portions of Valpak's Initial Brief and the Postal Service's Initial Briefs are threefold: (i) the objections are untimely; (ii) the procedural objections are without merit; and (iii) indicated portions taint the evidence. Valpak incorporates by reference its previous discussion (Valpak Reply Brief, pp. 8-16) of APWU's arguments on waiver, estoppel, and prejudice. New issues raised by APWU's Reply Brief (pp. 3-4) are responded to here. APWU argues that:

(1) the statutory right to cross-examination in cases such as this is not automatically conferred by the Administrative Procedure Act ("APA"), and

(2) Postal Service reliance in this case on pre-PAEA rate cases is not persuasive.

Both APWU arguments are faulty, as explained below.

1. APWU invokes Cellular Mobile Systems of Penn., Inc. v. FCC, 782 F.2d 182 (D.C. Cir. 1985), to argue that cross-examination's "necessity must be established under specific circumstances by the party seeking it." *Id.* at 198. However, the holding in Cellular Mobile is inapposite in cases such as this, where the APA rules of contested cases apply.

Cellular Mobile involved what is known as a "**paper hearing**" specifically authorized by the APA for certain types of cases, such as the licensing case litigated in Cellular Mobile, under the last sentence of section 556(d). *See* Cellular Mobile, at 198. The instant docket does not constitute such a paper hearing where certain procedures have been dispense with upon a determination that prejudice will not result, and the normal contested case rules — including the right of cross-examination — apply here.

APWU also mistakenly relies on a case involving an **informal** rulemaking under 5 U.S.C. section 553 — not a **formal** rulemaking under section 556. *See* American Public Gas Association v. FPC, 498 F.2d 718, 722 (D.C. Cir. 1974). APWU cites APGA v. FPC for the proposition that "the party seeking to cross-examine bears the burden of showing that it is necessary." APWU Reply Brief, p. 4. Although a rule requiring cross-examination requests may apply in **informal** rulemakings such as that in issue in APGA v. FPC, it is irrelevant to **formal** rulemakings, such as that required by 39 U.S.C. section 3661(b). *See*, *e.g.*, Newsweek v. U.S. Postal Service, 663 F.2d 1186, 1205 (2nd Cir. 1981); Mail Order Association of America v. U.S. Postal Service, 2 F.3d 408, 429-30 (D.C. Cir. 1993).

Neither PAEA nor APA permits the Commission to weigh perceived interests to determine whether to grant statutorily required due process rights in formal rulemakings. Congress already weighed such interests in enacting PAEA, which requires hearings on the record for section 3661 cases where the right to cross-examine testimony must be provided.

2. APWU asserts that "the Postal Service's reliance on judicial precedent involving PRC rate setting decision is not persuasive that due process requirements mandate cross-examination in this case." APWU Reply Brief, p. 4. APWU is correct that the cases cited by

the Postal Service involved pre-PAEA law. However, those Postal Reorganization Act-era rate cases were decided by the Commission under former 39 U.S.C. section 3622, where an "opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission.…" Former 39 U.S.C. § 3624(a). Former section 3622 invoked precisely those same APA rights under 5 U.S.C. section 556(d) that are now applicable to post-PAEA changes in the nature of postal services under 39 U.S.C. section 3661(b).

APWU argues that section 3661-type cases only involve advisory opinions and therefore "do not similarly implicate the Postal Service's due process rights" as in other cases. APWU Reply Brief, p. 5. APWU denigrates the importance of the "non-binding advisory opinion" that the Commission will issue under section 3661. APWU certainly has not litigated this case as if it does not matter what the Commission decides. In fact, APWU took full advantage of its due process right to cross-examine Postal Service's witnesses — a right required to be afforded for all record testimonial evidence.

CONCLUSION

In addition to the reasons set out above, APWU's motion to strike the indicated portion of Valpak's Initial Brief should be denied since it is identical in nature to the motion to strike potions of the Postal Service's Initial Brief which previously was denied. Presiding Officer's Ruling No. N2010-1/34 (Oct. 20, 2010).[2]

---

[2] APWU derides Valpak and the Postal Service for challenging reliance on nonrecord evidence, stating "all these objections stand to do is undermine the decision of the Commission by tainting the evidence." APWU Reply Brief, p. 7. Contrary to APWU's assertion, the only way such evidence could be tainted in this case would be for the

Respectfully submitted,

_____

William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Avenue West, Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for:
Valpak Direct Marketing Systems, Inc., and
Valpak Dealers' Association, Inc.

Commission to rely on statements not subjected to a statutory right to cross-examination, in violation of PAEA and APA, which Valpak has opposed.